SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 93

HERCULES GASOLINE COMPANY, INC.,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certionari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

MELVIN F. JOHNSON,
Counsel for Petitioner;

JOSEPH H. JACKSON,
Of Counsel for Petitioner.

August, 1945.

INDEX.

Page

Reply Brief of Petitioner 1

1. Respondent fails to show any reason why the writ should not be granted in this case by the contention that the decision is in accordance with the Northwest Steel Mills case 2

2. The Respondent fails to show that review should not be granted by argument that the law involved has been superseded 4

3. Respondent fails to meet the proposition of review vel non when he goes into the merits of petitioner's case 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 93

HERCULES GASOLINE COMPANY, INC.,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certionari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

When analyzed, the brief in opposition for the Respondent, the Commissioner of Internal Revenue, does not meet the proposition presented in petitioner's application and brief for the writ of certiorari.

In the petition for review of this case, petitioner sets forth the conflict between the decision of the Fifth Circuit Court of Appeals, of which review is sought, with the several decisions of the Third Circuit Court of Appeals and other Federal court decisions. In opposing

petitioner's application, Respondent argues that this case does not warrant further review because "it was correctly decided in accordance with principles enunciated by this Court in Helvering v. Northwest Steel Mills, 311 U. S. 46, and the statutory provision involved has been superseded". This argument is unsound and illogical because the first point is a hasty generalization on insufficient data and is assumed by Respondent, through mistake and error, and the second point, although true, constitutes no reason for denying review.

1.

Respondent fails to show any reason why the writ should not be granted in this case by the contention that the decision is in accordance with the Northwest Steel Mills case.

Respondent is making the same mistake that a number of Judges and Courts have made with reference to Your Honors' decision in *Helvering v. Northwest Steel Mills.* He quotes from *dictum* instead of opinion. Your decision was, primarily, an interpretation of Sec. 26 (c) (1) of the 1936 Revenue Act. In concluding that the law does not authorize a credit when applied to statutorily prohibited dividends, this Court thought such construction of Sec. 26 (c) (1) was supported by a consideration of Sec. 26 (c) (2). It was of Sec. 26 (c) (2) that the Court said "this section referred to routine contracts dealing with ordinary debts." If Respondent had not fallen into this palpable error, he would quote correctly

from your decision in referring to Sec. 26 (c) (1), where Your Honors put the matter in this way:

> "The natural impression conveyed by the words 'written contract executed by the corporation' is that an explicit understanding has been reached, reduced to writing, signed and delivered."

The certificates of stock of Hercules Gasoline Company, Inc., were signed by the President and Secretary, they contained by specific reference to the charter the dividend prohibition which the record shows was an explicit understanding and they were delivered to and accepted by the preferred stockholders. It would seem, to the contrary of Respondent's argument, more logical to say that the subject case should be reviewed and uniformity established.

Thus, it is improper and illogical to say that the Fifth Circuit Court in the present case decided the contract question involved here in accordance with the principles enunciated by this Court in *Helvering v. Northwest Steel Mills* and as a consequence this Court should decline to reconcile the decisions because the conflict admittedly exists among the circuits as to the meaning of the *Northwest Steel* case,—or whether it applies at all to the issue herein.

The Northwest Steel Mills case did not decide whether stock certificates forbidding payment of dividends constituted a binding contract under this section of the law because that was not an issue to be decided in the case. Here is the first presentation of this legal proposition to this Court.

The expression of this Court, so often quoted by courts, ("routine contracts", etc.) was referring to 26 (c) (2) of the 1936 Revenue Act. This section gives credit to a corporation required to set earnings aside to pay its creditors. Of course, it is so plain that "He who runs may read" that 26 (c) (1) applies to any restrictive "contract" made by a corporation with anyone, whether or not he is a creditor of the corporation. (See original Brief with petition, pages 9-10).

Judge Hutcheson, in his dissenting opinion (R. 117-119 in the present case, clearly demonstrates that this case was not decided by the Fifth Circuit in accordance with the principles enunciated in the *Northwest Steel Mills* case because, as he points out, the majority of his court bottomed their reasoning on a *dictum* contained in the *Northwest Steel Mills* case, "which decided an entirely different question arising on an entirely different set of facts from that presented here" and Judge Hutcheson states the existing conflict of decisions with much more brevity and erudition than we can state it. It is clear that he looks ahead to a clarifying decision by this Court.

2.

The Respondent fails to show that review should not be granted by argument that the law involved has been superseded.

In this connection, the Respondent's Brief in opposition, admitting that there is a divergency of opinion to resolve, makes the argument seriously that since the revenue laws no longer contain provisions corresponding to

Sec. 26 (c) (1) of the 1936 Act, the number of cases still concerned with that section is consequently unappreciable and suggests, by connotation, that this Court should decline to review.

This is a poor excuse to urge in order to have this Court let the petitioner stew in the injustice of paying an illegal tax. Because there will not be many other cases involving the same point is no sound argument against a review of this case if it presents a reviewable ground. He is disregarding the principle inscribed on the frieze of this Court's dwelling place: "Equal Justice Under Law."

Counsel correctly states that the statute has been superseded, but we submit that this does not constitute any reason why the Court in its discretion should not review the present case if a diversity exists and an injustice is being done. Our right to petition for, or the Court's discretion to grant, the writ is not measured by quantity.

3.

Respondent fails to meet the proposition of review vel non when he goes into the merits of petitioner's case.

The brief in opposition to petitioner's prayer for writ of certiorari in the discretion of this Court, makes the statement that Congress intended to afford the grace of Sec. 26 (c) (1) to corporations which are contractually obligated to set earnings aside for the protection of creditors. In reply to this argument, let us say, firstly, that this constitutes no reason to deny petitioner the writ and,

secondly, that Congress by plain language in its recorded statute referred to the credit being given to *corporations obligated to set earnings aside for the discharge of a debt in Sec. 26 (c) (2)* of the 1936 Act and made no such requirement for the credit in 26 (c) (1) of the same law.

It would seem, in conclusion, that the opposition contains no real reason why the review should not be granted and the divergency of opinion resolved by this Court.

Respectfully submitted,

MELVIN F. JOHNSON,
Counsel for Petitioner;

JOSEPH H. JACKSON,
Of Counsel for Petitioner.

August, 1945.